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No. 86-1084

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARLAN E. BOYLES, *et al.*,

Petitioners,

v.

ROBERT P. ALMOND, *et al.*,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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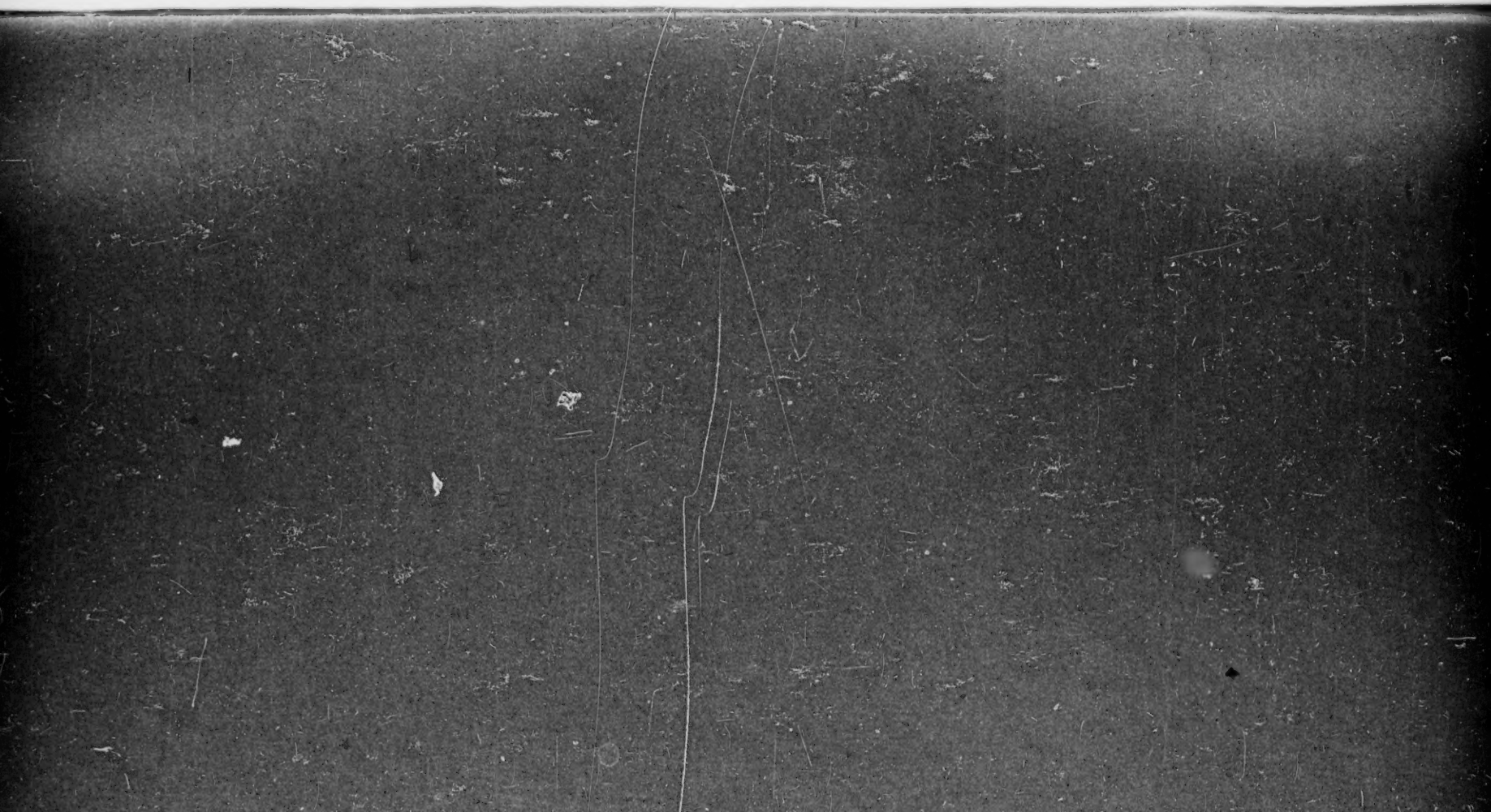

QUESTIONS PRESENTED

Whether the trial court and the Court of Appeals correctly determined that the Eleventh Amendment does not prevent blind concessionaires from recovering that portion of their earnings diverted from them, in violation of federal law, to petitioners.

Whether the trial court properly exercised its equitable discretion in awarding the relief requested.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Robert P. Almond et. al., are visually handicapped North Carolina residents licensed as vending stand operators under the federal Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1982). They respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in the case entered on June 6, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Eleventh Amendment to the United States Constitution, which is set out in the

petition for writ of certiorari ("Petition") at 2, and the North Carolina constitutional and statutory provisions reproduced in Appendix F to the Petition, this case involves the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1982), and, in particular, 20 U.S.C. § 107b, which is reproduced in Appendix A to this brief. Appendix A also contains relevant provisions of the North Carolina General Statutes not reproduced in the Petition.

STATEMENT OF THE CASE

The district court's accurate and succinct account of the background giving rise to this dispute can be found at pages A-19 through A-23 of the Petition. Respondents offer the following Statement of the Case to provide some additional detail as well as citations to the stipulations of undisputed fact filed by all parties in the district court. The stipulations themselves are reproduced in Appendix B *infra* and the exhibits thereto are contained in the Joint Appendix in the Court of Appeals ("JA"), a copy of which has been lodged with this Court.

A. The Randolph-Sheppard Vending Program

In 1936, Congress enacted the Randolph-Sheppard Act to provide business opportunities for the visually handicapped. Act of June 20, 1936, Ch. 638, §§ 1-10, 49 Stat. 1559-1560 (codified as amended at 20 U.S.C. §§ 107-107f (1982)). Under the Act as amended, the federal Rehabilitation Services Administration ("RSA") is authorized to designate a state agency to license visually handicapped persons to operate vending facilities on federal and other property within the State. 20 U.S.C. §§ 107a and 107b. The licensing agency also administers the vending stand program

(the "program") within the State. 20 U.S.C. § 107b (Appendix A at 1a). Since 1955, the North Carolina Department of Human Resources, Division of Services for the Blind, and its predecessor agencies ("DHR") have been designated as the Randolph-Sheppard licensing agency in North Carolina and have administered the Randolph-Sheppard program in North Carolina. Stipulations 2-4 (Appendix B at 7a-8a).

North Carolina has never appropriated any funds for the administration or operation of the vending stand program. Stipulation 19 (Appendix B at 14a). The costs of administering the program have always been paid primarily with federal funds. Stipulation 6 (Appendix B at 8a); *see also* JA at 80. Specifically, the State has used a portion of its federal Vocational Rehabilitation grant to fund the program. The non-federal share of the program budget has come primarily from monies generated through the vendors' stand sales. Stipulation 6 (Appendix B at 8a).

In applying for designation as Randolph-Sheppard licensing agency, and in exchange for the federal grants it has received to operate the program, State officials and agencies have agreed to administer the program in accordance with the Randolph-Sheppard Act and regulations promulgated thereunder. Stipulation 7 (Appendix B at 9a).

Prior to 1974, the Randolph-Sheppard Act provided that deductions from the "proceeds" of vending facilities could be "set aside" for only four specific purposes:

1. Maintenance and replacement of equipment;
2. The purchase of new equipment;
3. Management services; and

4. Assuring a fair minimum return to operators of vending stands.

20 U.S.C. § 107b(3) (1970); *see* Petition at A-20. The Act further provided that "in no event shall the amount of such funds to be set aside from the proceeds of a vending stand exceed a reasonable amount which shall be determined by the Secretary." *Id.* In 1974, Congress amended the Act to provide that vending stand proceeds could be set aside for an additional purpose: the purchase of retirement benefits and other fringe benefits for the vendors, *but only if a majority of blind vendors in the state vote for such benefits to be purchased after full disclosure by the licensing agency of all information relevant to any proposed benefit program.* Act of Dec. 7, 1974, Pub. L. 93-516, Title II, § 204, 88 Stat. 1625 (*amending* 20 U.S.C. § 107b); *see* Appendix A at 2a.

B. The Vendors and the Retirement System

Although the Randolph-Sheppard Act and regulations have always provided that the profits of vending stands (less any money properly set aside for an authorized purpose) belong to the vendors, prior to July, 1971 vendors in North Carolina were paid a flat weekly salary. Stipulation 11 (Appendix B at 10a). The profits generated by the stands were retained by DHR's predecessor, the Bureau of Employment for the Blind, which used some of these unlawfully retained profits to establish an inadequate retirement program for the vendors. Petition at A-21; *see also* JA at 109-116, 120-164. In 1969, $300,000.00 of the undistributed vending stand profits were transferred into the General Fund of the state. Stipulation 14 (Appendix B at 11a); JA at 117. Finally, in July, 1971, the method of compensating North Carolina vendors

was modified in an apparent attempt to bring the State's program into compliance with the Randolph-Sheppard Act. At the same time, the General Assembly, without regard for the Randolph-Sheppard Act, declared the vendors to be State employees, enrolled them involuntarily in the North Carolina Teachers' and State Employees' Retirement System ("Retirement System"), and transferred to the Retirement System the assets (amounting to $163,490.09) of the private retirement plan created by the Bureau with the vendors' funds from their stand proceeds. 1971 N. C. Sess. Laws, Chapter 1025; Stipulation 17 (Appendix B at 12a); JA at 165-167.

No vote was ever held to determine whether a majority of the blind vendors wished to participate, or to continue participating, in the Retirement System and to have contributions to the System deducted from their earnings. Stipulation 9 (Appendix B at 9a-10a); JA at 220, 221 (¶ 4).

* * *

As the district court found, the Retirement System is vested with the "power and privileges" of a corporation, and is administered by a board of trustees which has the right to sue and be sued. Opinion and Order of the District Court, Petition at A-25; N. C. Gen. Stat. §§ 135-2 (Appendix A at 3a), 135-6 (Petition at A-38).[1] It may acquire and dispose of real and personal property and hold such property in its corporate name. *Id.* During the years that respondents were forced to participate in the Retirement System, its members included employees of state agencies, as

[1] Except where otherwise indicated, all citations to the North Carolina General Statutes are to the 1986 code.

well as the employees of various non-state and private entities, such as county and city school boards, the North Carolina Symphony Society, Inc., the North Carolina Art Society, Inc., the North Carolina Education Association, the North Carolina State Employees' Association, the North Carolina Firemen's Association, the North Carolina Highway Employees Association, the North Carolina Teachers' Association, the State Employees' Credit Union, alumni associations of state-supported universities and colleges, local professional associations of teachers and state employees, and the North Carolina School Boards Association. *See* N. C. Gen. Stat. §§ 135-1(11) (1981) (Appendix A at 3a); N. C. Gen. Stat. § 135-27 (Appendix A at 4a-6a). Under state law, contributions to the Retirement System are divided into two parts, the "employer" contribution and the "employee" contribution. The System's assets include these contributions made by state and non-state employers and employees, as well as very substantial investment income. Petition at A-25. Funds in the Retirement System, by state law, may not be used for general state purposes. N. C. Const. art. V, § 6.

In the case of any other participant in the Retirement System, an employer entity makes the "employer" contribution to the System on that person's behalf. However, neither the State nor any other entity ever appropriated or spent any funds for "*employer*" contributions to the Retirement System on behalf of the blind vendors. Stipulation 19 (Appendix B at 14a). Rather, DHR deducted (or set aside) the "*employer*" contribution from each vendor's stand proceeds and then deducted the "*employee*" contribution from the gross pay distributed to the vendor.

Stipulation 18 (Appendix B at 14a); JA 220-221 (2-3). In short, DHR took from the visually handicapped vendors monies amounting to *both* the "employer" and the "employee" share of retirement contributions and transferred those monies to the Retirement System.

Despite this fact, on those occasions when vendors left the program over the years and were allowed to withdraw from the Retirement System, the System refunded to them *only* that portion of their contributions comprising the "employee" share, plus statutory interest. JA at 180-181, 184-199. The vendors were not allowed to withdraw the so-called "employer" share, although it had been taken from them rather than paid by the State or by anyone else. Pursuant to N. C. Gen. Stat. § 135-5(f) (Petition at A-36-37), other Retirement System members who withdraw from the System receive a full refund of *all* contributions they have made to the System.

In March 1982, the federal government (RSA) informed DHR that "North Carolina's Randolph-Sheppard program [was in] an awkward, possibly illegal, administrative posture." Stipulation 23 (Appendix B at 14a); JA at 182-183. Among other things, RSA complained about the program's classification of vendors as State employees and its use of the vendors' earnings to make the "employer" contributions to the Retirement System. *Id.* In an effort to bring the North Carolina vending stand program into compliance with the governing Randolph-Sheppard Act, the 1983 Session of the North Carolina General Assembly enacted Senate Bill 247, which provided that after September 30, 1983, the vending stand operators would be classified not as state employees but as independent con-

tractors, and that individuals licensed in the future as vendors would not be required (or permitted) to participate in the Retirement System. 1983 N.C. Sess. Laws, Chapter 867; Stipulation 25, (Appendix B at 15a); JA at 200-201.

Pursuant to this recent Act, licensed vendors who had been participating in the Retirement System were required to make an irrevocable election by September 30, 1983, (1) to continue contributing *both* the "employer" and "employee" shares to the Retirement System; or (2) to cease contributing to the System *and* (a) receive a refund of only "employee" contributions, plus statutory interest; (b) apply for and commence receiving a monthly retirement allowance; or (c) leave accumulated contributions in the System and retain the right to receive an actuarially reduced pension at some future date. Stipulation 26 (Appendix B at 15a); JA at 202-211.

Although both the "employer" and the "employee" contributions to the System on the vendors' behalf were always paid with money taken from the vendors—and not with State funds—they were not given the option to withdraw both their "employer" and "employee" contributions from the System. Id.; JA at 220-221 (¶ 3).

After attempting unsuccessfully to resolve this matter through administrative channels, respondents brought this action on behalf of themselves and all others similarly situated to recover *all* monies contributed *by them* to the Retirement System, including so-called "employer" contributions, which were unlawfully and unconstitutionally withheld from them and retained by the petitioners. The district court

granted respondents' motion for summary judgment and the Court of Appeals affirmed.

The petitioners do not seek review of the district court and Court of Appeals decisions that the blind vendors' earnings were wrongfully diverted from them to the Retirement System in violation of the Randolph-Sheppard Act. Petitioners do assert that *certiorari* should be granted to consider (1) whether the Eleventh Amendment insulates the Retirement System trustees against a directive to return to the blind vendors their earnings wrongfully taken; and (2) whether such a directive is equitable.[2]

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY DECIDED THAT PETITIONERS CANNOT CLOAK THEMSELVES IN THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND THAT DECISION NEITHER CONFLICTS WITH DECISIONS OF THIS COURT NOR CREATES A CONFLICT AMONG THE CIRCUITS.

This case concerns the status, for Eleventh Amendment immunity purposes, of the North Carolina Teachers' and State Employees' Retirement System.[3]

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[2] Phillip J. Kirk, Secretary of the North Carolina Department of Human Resources ("DHR"); Herman Gruber, Director of DHR's Division of Services for the Blind ("the Division"); and Mary Ann Van Name, Chief of Business Enterprises within the Division, are also defendants in this action but have not petitioned this court for a writ of *certiorari*.

[3] As the lower courts specifically and correctly held, this question is one of federal law. *See, e.g., Blake v. Kline*, 612 F.2d 718, 722 (3rd Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed.2d 1112 (1980). *See generally* 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 138 & n.32 (1984).

Contrary to petitioners' contention, Petition at 16-20, the analytical approach employed by the courts below is entirely consistent with that used by other Courts of Appeals, and by this Court, in determining whether a particular entity is entitled to assert a state's Eleventh Amendment immunity. Specifically, in this type of case courts consider and weigh factors such as the autonomy of the entity, whether under state law it may hold and dispose of property in its own name, whether it is authorized to sue and be sued, its funding sources, and whether a judgment against it would impinge upon the state treasury. *See, e.g., Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911)(state agricultural college not entitled to assert State's Eleventh Amendment immunity); *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796, 83 L. Ed. 2d 789 (1985). *See generally* 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 135-36 (1984).

The courts of appeals have applied this type of analysis to a wide variety of entities and have concluded that certain ones may share in a state's Eleventh Amendment immunity while others may not. *Compare Hall v. Medical College with Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, ___U.S. ___, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986); *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150, 103 S. Ct. 796, 74 L. Ed. 2d 1000 (1983). Each case necessarily involves a detailed anal-

ysis of the organization and operation of the particular entity in question and is thus *sui generis*.

No other circuit court has passed on the Eleventh Amendment status of the Retirement System. Nor do any of the cases relied on by petitioners involve an analysis of some *other* retirement system. The sole retirement system case cited by petitioners, *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980), held that the district court had erred in dismissing an action against the Public School Employees' Retirement Board of Pennsylvania on Eleventh Amendment grounds. (The Third Circuit's Eleventh Amendment analysis in *Blake* was specifically approved and utilized by the district court in this case. Petition at A-26.) Retirement benefits are provided to public employees in different places through an immense variety of means, with varying systems of public and private, employer and employee participation, contribution, and funding. The result in this case does not mean that the Fourth Circuit would reach a similar result regarding another retirement system in another state within its jurisdiction. And the specific holding of this case has little precedential value with respect to other agencies affiliated with governments.

In the final analysis, petitioners' quarrel with the decision below involves the particular facts found as a result of the court's interpretation and analysis of a complicated, unique set of circumstances. Not only is this issue particularly inappropriate for review on *certiorari*, but the district court reached the correct result.

Having carefully reviewed the complex relationship of the Retirement System to the State of North Carolina, Judge Britt concluded that "[t]he 'autonomy' factor does not weigh heavily in favor of either party in this case." Petition at A-25. Although the State exercises some control over the Retirement System, the System is vested with "the power and privileges of a corporation," N. C. Gen. Stat. § 135-2 (Appendix A at 3a), and is administered by a Board of Trustees, which is "a body politic and corporate" with the right to sue and be sued and to acquire and dispose of real and personal property, N. C. Gen. Stat. § 135-6 (Petition at A-38), and which holds all property acquired in the corporate name. *Id.*; N. C. Gen. Stat. § 135-2 (Appendix A at 3a).[4]

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[4] As petitioners point out, this Court has held that the designation under state law of a department of state government as a "body corporate" with the capacity to "sue and be sued" does not constitute a waiver of Eleventh Amendment immunity. Petition at 12 (citing *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981)). In *Florida Department of Health* there was no question whether the Department of Health was an arm of the state entitled to assert its immunity; rather, the issue was whether the state had waived its immunity with respect to that department. Here, by contrast, the issue is not one of *waiver* but of whether the entity in question has any claim at all to the state's immunity. Whether an entity is a body corporate, with the power to hold property and to sue and be sued *has* been considered relevant to *that* issue. *See, e.g., Hopkins* 221 U.S. at 646; *Hall*, 742 F.2d at 305-06; *Blake*, 612 F.2d at 725. Moreover, although the district court found that the factors discussed in the text weigh against the Retirement System's claim to be an alter-ego of the State, those factors were by no means dispositive.

Given the inconclusiveness of the 'autonomy' analysis, the district court correctly placed great emphasis on the fact that the monies respondents seek to recover would not come from the general revenues of the State. Petition at A-25-27. Courts of Appeals have repeatedly recognized the particular importance for Eleventh Amendment analysis of whether a judgment will have to be paid from the state treasury. *Jacintoport*, 762 F.2d at 441; *Brown v. Porcher*, 660 F.2d at 1006-1007; *Blake v. Kline*, 612 F.2d at 723.

Petitioners cannot dispute that the relief awarded by the court below—a refund of contributions respondents were wrongfully required to make to the Retirement System—would not be paid from the State treasury or from the general revenues of North Carolina. Rather, it would be paid from separate and independent pension funds maintained by the trustees of the Retirement System. *See* N. C. Gen. Stat. § 135-8 (Petition at A-44-52).

Although some of the monies held by the Retirement System defendants were originally appropriated by the North Carolina General Assembly, a much more substantial portion of those monies have come from other sources, including State employees, non-State employers (such as county and city school boards, the North Carolina Association of Educators, the North Carolina Symphony Society, Inc., and the other private entities identified *supra* at 6), the employees of these non-State and private entities, and investment income. *Cf. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (11th Amendment does not bar suit against school board despite fact that board received "a significant amount of money from the

State"). Indeed, this diversity of membership, with funding and participation by various private employers and private employees, is one obvious factor distinguishing this retirement system from others, as well as from departments of state government.

In addition, participants in the Retirement System who withdraw from it are entitled to a refund of their accumulated contributions plus only 4% interest, *see* N. C. Gen. Stat. §§ 135-5(f), 135-1(1), 135-7(b) (Petition at A-35-44), despite the fact that their accumulated contributions have earned far more than 4% in investment income. *See* JA at 253, 272 (average annual yield of approximately 7.5%). The balance of investment income on *employee* contributions (as well as all the income on employer contributions) remains with the Retirement System. This "excess" investment income to the Retirement System on employee contributions from a single year is many times greater than the monetary relief sought in this action. (Of course, what respondents seek is a refund of monies taken from *themselves alone*.)

Moreover, unlike the funds in the State Treasury—or even those funds in certain segregated State accounts—the State is not free to dispose of Retirement System funds at its pleasure. *See* N.C. Const. art. V, § 6 (Petition at A-35). Beneficiaries of the System have a clearly defined equitable interest in the monies held in the Annuity Savings Fund and, with respect to vested beneficiaries, in the Pension Accumulation Fund as well. *Cf. Dillon v. Wentz*, 227 N.C. 117, 41 S.E.2d 202 (1947) (members of public employee retirement system funded wholly or in part by contributions of members have a vested interest in the assets of the fund upon becoming eligible for retire-

ment). *See generally* Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R.2d 437 (1957 and Later Case Serv.).

Petitioners suggest that even though a judgment against them will not be paid out of the general revenues of North Carolina, such a judgment would indirectly result in increased appropriations from the general revenues to the Retirement System. Petition at 13. However, the district court carefully considered this argument and rejected it. Petition at A-27. It correctly concluded that "the relief requested by the plaintiffs would [not] *inevitably* lead to an additional appropriation of state fund[s, . . . because it] may be satisfied by investment income or a slight decrease in the amount of benefits paid to other beneficiaries of the Retirement System." *Id.* (emphasis added). Although petitioners themselves acknowledged below that the relief ordered could be offset by a decrease in benefits to members of the Retirement System, Brief of Appellants at 12, they now claim, without citation, that they cannot "decrease benefits without either violating state law or obtaining a legislative change . . . ." Petition at 13-14. Be that as it may, they have never disputed respondents' contention made below that they could offset the entire judgment at once by exercising their discretion under N. C. Gen. Stat. § 135-7(b) to set the "regular interest" credited to the Annuity Savings Fund at a rate slightly lower than 4% for a single year.[5] The lower

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[5] "Regular interest" is that amount credited annually by the Retirement System defendants from the Pension Accumulation Fund to the Annuity Savings Fund. *See* N. C. Gen. Stat. § 135-7(b) (Petition at A-43-44). As petitioners explain in their petition at 5-6, the resources of the Retirement System are held in two

courts, then, correctly concluded that the relief sought will not inevitably impinge upon the general revenues of North Carolina maintained in the State Treasury.

Although the courts below thus employed the proper analytical approach and reached the correct result on the unique facts of this case, petitioners insist, wrongly, that "the decision below is wholly inconsistent with language of this Court in recent cases." Petition at 10 (citing *Green v. Mansour*, ___ U.S. ___, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Cory v. White*, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982); *Florida Department of Health and Rehabilitative Services v.*

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funds: (1) *the Annuity Savings Fund*, which consists of "employee" contributions to the System plus interest paid into that Fund on an annual basis from the Pension Accumulation Fund; and (2) the *Pension Accumulation Fund*, which consists of (a) monies paid to the System as "employer" contributions, (b) the "employee" contributions of retired members which are transferred to the Pension Accumulation Fund upon the member's retirement, and (c) all investment earnings of the Retirement System except the interest paid annually on individual "employee" contribution accounts. The investment earnings on monies held in the Annuity Savings Fund remain in the Pension Accumulation Fund except for the "regular interest" credited annually. N. C. Gen. Stat. § 135-7(b) vests in the Retirement System defendants the discretion to set "regular interest" anywhere between 3% and 4%. By reducing "regular interest" from its present level of 4% to 3.9% *for a single year*, the Retirement System defendants could offset the relief awarded without requiring an increase in appropriations from the general revenues of North Carolina.

Florida Nursing Home Association. 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981)).

None of these cases in any way involved the question whether a particular entity was entitled to assert a state's Eleventh Amendment immunity. *Green*, *Pennhurst*, and *Cory v. White* all involved the scope of the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).[6] Specifically, *Green* held that the *Ex parte Young* doctrine does not permit "notice" or declaratory relief against state officials except where ancillary to appropriate injunctive relief. *Pennhurst* held that *Ex parte Young* does

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[6] *Ex parte Young* and its progeny "make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689, 102 S. Ct. 3304, 3317, 73 L. Ed. 2d 1057 (1982). Although such actions may have an obvious impact on the state itself, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst*, 465 U.S. at 102, 104 S. Ct. at 909 (quoting *Young*, 209 U.S. at 160).

The lower courts' holding—that the Retirement System is not an arm of the State entitled to assert its Eleventh Amendment immunity—does not rely on the *Ex parte Young* doctrine. Respondents did, however, argue in the alternative below that if the Retirement System were, as a general matter, entitled to assert the State's Eleventh Amendment immunity, the relief requested could nonetheless be awarded because petitioners have expropriated respondents' property in violation of the Fourteenth Amendment and respondents do not seek a damages award from the State treasury. Brief of Plaintiffs-Appellees at 17-20, 26-30. In light of their decision on "alter-ego" grounds, the lower courts did not reach this argument.

not authorize a federal court to award relief against state officials on the basis of *state* law because to do so is not necessary to vindicate the supreme authority of federal law.[7] Similarly, *Cory v. White* held that *Ex parte Young* does not authorize federal courts to entertain federal interpleader actions against state officials because such suits do not involve a violation of federal (or state) law. *Atascadero* and *Florida Department of Health* involved the question whether a state has waived its Eleventh Amendment immunity. (*Atascadero* also involved a question of Fourteenth Amendment abrogation of Eleventh Amendment immunity.)

Although petitioners would like to make much of plaintiffs' lack of success in this Court's recent Eleventh Amendment cases, none of these cases in any way casts doubt on the lower courts' framework of analysis or result. The petition should therefore be denied.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION AND THIS COURT SHOULD NOT GRANT THE PETITION TO REVIEW THE EXERCISE OF SUCH POWER.

Finally, petitioners ask this Court to consider whether the trial court properly exercised its equitable power in granting the relief sought by respondents. The exercise of such equitable power is committed to the discretion of trial courts and should

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[7] If, as the lower courts held, petitioners are not entitled to assert the State's Eleventh Amendment immunity *at all*, *Ex parte Young*, and the limits placed on it in *Pennhurst*, do not come into play. Thus, petitioners' invocation of *Pennhurst* in their second question presented and in their petition at 20 is misplaced.

be disturbed by an appellate court only for a clear showing of an abuse of discretion. The scope of a district court's equitable power to remedy past wrongs is broad. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971). Given these well-established principles, based as they are on a trial court's peculiar advantage in fashioning relief appropriate to the facts before it, this final issue presented by petitioners is particularly inappropriate for review on writ of *certiorari*.

The district court ordered petitioners to return earnings wrongfully taken from respondents. In ruling that equity so requires, the district court specifically and correctly rejected the petitioners' arguments that they would not be unjustly enriched if allowed to keep respondents' funds. As the court observed:

> [t]he principle of equitable restitution is to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance . . . .' D. Dobbs, *Handbook on the Law of Remedies*, § 4.1 at 224 (1978).

Petition at A-24.

It is inequitable for petitioners to keep respondents' monies because those monies have been a windfall and unjust enrichment to the System and its members. Unlike other "employer" contributions to the Retirement System, the so-called "employer" contributions made on behalf of respondents came *not* from State revenues, but from the blind vendors' earnings. Petitioners have not disbursed, and respondents have

not received, anything of value in exchange for those wrongfully taken earnings. Moreover, the relief awarded below can be funded by a miniscule decrease in the level of interest paid to other Retirement System members, which reduction respondents are authorized to make. *See supra* p. 15 & n.5. In addition, the district court's award allows petitioners to retain a substantial portion of the investment earnings they have realized on respondents' funds since 1971. (The district court awarded pre-judgment interest of 4%, whereas Retirement System investment earnings have averaged 7.5%. *See* JA at 253, 272).

Finally, petitioners appear to argue that the result below is inequitable because blind vendors who will benefit by withdrawing from the Retirement System may do so, while those who might profit by remaining in the System may do that. Petition at 21. But this result is not inappropriate because under State law any blind vendor who now might choose to remain in the System would have to continue to pay *both* "employer" and "employee" contributions. N.C. Gen. Stat. § 135-16.1 (Petition at A-52-53); Stipulation 26 (Appendix B at 15a).

The district court's carefully crafted equitable remedy presents no issue appropriate for review on *certiorari*.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

This the 30th day of January, 1987.

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APPENDIX

Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 USC § 107b (1982)

§ 107b. Application for Designation as State Licensing Agency—Cooperation with Secretary—Stock and Equipment.

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree—

(1) to cooperate with the Secretary in carrying out the purpose of this Act [20 U.S.C. §§ 107 *et. seq.*];

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: Provided, however, That such equipment and stock may be owned by the licensing agency for the use of the blind, or by the blind individual to whom the license is issued: And provided further, That if the ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing.

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities: Provided, however, That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside from such purposes;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this Act [20 U.S.C. §§ 107 *et seq.*], as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise

resolved by such hearing to arbitration as provided in section 5 of this Act [29 U.S.C. § 107d].

North Carolina General Statutes

N. C. Gen. Stat. § 135-1 (1981). Definitions.

* * *

(11) "Employer" shall mean the State of North Carolina, the county board of education, the city board of education, the State Board of Education, the board of trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, or any other agency of and within the State by which a teacher or other employee is paid. "Employer" shall also mean the North Carolina Symphony Society, Inc., and the North Carolina Art Society, Inc.

* * *

N. C. Gen. Stat. § 135-2. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina. The Retirement System so created shall be established as of the first day of July, 1941.

It shall have the power and privileges of a corporation and shall be known as the "Teachers' and State Employees' Retirement System of North Carolina," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held.

N. C. Gen. Stat. § 135.27. Transfers from State to certain association service.

(a) Any member whose service as a teacher or State employee is terminated because of acceptance of a position prior to July 1, 1983, with the North Carolina Education Association, the North Carolina State Employees' Association, North Carolina State Firemen's Association, the North Carolina State Highway Employees Association, North Carolina Teachers' Association and the State Employees' Credit Union, alumni associations of state-supported universities and colleges, local professional associations of teachers and State employees as defined by the Board of Trustees, and North Carolina State School Boards Association may elect to leave his total accumulated contributions in this Retirement System during the period he is in such association employment, by filing with the Board of Trustees at the time of such termination the form provided by it for that purpose.

(b) Any member who files such an election shall remain a member of the Retirement System during the time he is in such association employment and does not withdraw his contributions. Such a member shall be entitled to all the rights and benefits of the Retirement System as though remaining in State service on the basis of the funds accumulated for his credit at the time of such transfer plus any additional accruals on account of future contributions made as hereinafter provided. Such former State employee may restore any such account and pay into the annuity savings fund before July 1, 1960, such amounts as would have been paid after transfer to such service, provided that the association makes contributions to the Retirement System on behalf of such former members in accordance with subsection (c) of this section.

(c) Under such rules as the Board of Trustees shall adopt, the association to which the member has been transferred may agree to contribute to the Retirement System

on behalf of such member such current service contributions as would have been made by his employer had he remained in State service with actual compensation equal to the remuneration received from such association; provided the member continues to contribute to the Retirement System. Any period of such association employment on account of which contributions are made by both the association and the member as herein provided shall be credited as membership service under the Retirement System.

(d) The governing board of any association or organization listed in subsection (a), in its discretion, may elect on or before July 1, 1983, by an appropriate resolution of said board, to cause the employees of such association or organization so employed prior to July 1, 1983, to become members of the Teachers' and State Employees' Retirement System. Such Retirement System coverage shall be conditioned on such association's or organization's paying all of the employer's contributions or matching funds from funds of the association or organization and on such board's collecting from its employees the employees' contributions at such rates as may be fixed by law and by the regulations of the Board of Trustees of the Retirement System, all of such funds to be paid to the Retirement System and placed in the appropriate funds. Retroactive coverage of the employees of any such association or organization may also be effected to the extent that such board requests; provided, the association or organization shall pay all of the employer's contributions or matching funds necessary for such purposes; and, provided further, such association or organization shall collect from its employees all employees' contributions necessary for such purpose, computed at such rates and in such amount as the Board of Trustees of the Retirement System shall determine, all of such funds to be paid to the Retirement System, together with such interest as may be due, and placed in the appropriate funds. The provisions of this subsection shall be

fully applicable to the North Carolina Symphony Society, Inc. and the North Carolina Art Society, Inc.

(e) Notwithstanding the foregoing, employees of the State Employees' Credit Union who are in service and members of the Retirement System on June 30, 1983, shall, on or before October 1, 1983, make an irrevocable election to do one of the following:

(1) Continue contributing membership service under the same conditions and requirements as are otherwise provided, and have the rights of a member to all benefits and a retirement allowance; or

(2) Receive a return of accumulated contributions with cessation of contributing membership service, under G.S. 135-5(f) and in any event with regular interest regardless of membership service; or

(3) Terminate contributing membership service and be entitled alternatively to the benefits and allowances provided under G.S. 135-3(8) or G.S. 135-5(a).

(f) Notwithstanding the foregoing, employees of the State Employees Association of North Carolina, the employees of the North Carolina Association of Educators, and the employees of the North Carolina School Boards Association who are in service and members of the Retirement System on June 30, 1985, shall, on or before October 1, 1985, make an irrevocable election to exercise one of the three options provided in G.S. 135-27(e).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL ACTION NO. 84-138-CIV-5

ROBERT P. ALMOND, *et al.*

Plaintiffs,

v.

HARLAN E. BOYLES, *et al.*

Defendants.

STIPULATIONS

The parties to this action, by and through counsel, hereby stipulate to the following facts and to the authenticity of the attached Exhibits, but make no stipulation as to the relevancy or admissibility thereof:

1. The North Carolina State Commission for the Blind (the "Commission") was created by legislative act in 1935. Around 1945, pursuant to N.C.G.S. §§111-27 and 111-27.1, the Commission began administering a vending stand program (the "program") designed to provide business opportunities for visually handicapped residents of North Carolina.

2. In 1955, the Commission was designated by the United States Department of Health, Education and Welfare ("HEW") as the agency to license blind persons for the operation of vending stands in North Carolina under the Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.* *See* Exhibit 1 (this and subsequently cited Exhibits are attached hereto).

3. The program was administered by the Bureau of Employment for the Blind, an arm of the Commission, until 1974, when, pursuant to the Executive Reorganization Act

of 1973, the North Carolina Department of Human Resources ("DHR") succeeded the Commission and assumed its duties as licensing agency. Since then, the program has been administered by DHR through its Division of Services for the Blind (the "Division"). The Division operates solely under authority delegated to it by the Secretary of the Department of Human Resources.

4. In 1979, HEW's Rehabilitation Services Administration, the federal agency charged with supervision of the Randolph-Sheppard program, redesignated the North Carolina Department of Human Resources, Division of Services for the Blind as the North Carolina Randolph-Sheppard licensing agency. *See* Exhibit 2.

5. The Teachers' and State Employees' Retirement System, and its officials, agents, and employees, have never been designated agencies for licensing blind persons under the Randolph-Sheppard Act, and have never participated in contract or funding negotiations with the United States Government in relation to this Act nor had any administrative responsibility or authority under this Act.

6. At all times relevant herein, the costs of administering the vending stand program in North Carolina have been paid primarily with federal funds provided under the Vocational Rehabilitation Act, 29 U.S.C. §§701 *et seq.* The Vocational Rehabilitation Act establishes a joint Federal-State program under which the federal government will, up to a designated amount, match 4 to 1 (formerly 3 to 1) non-federal funding for purposes of vocational rehabilitation. In North Carolina, the non-federal share of the vending stand program budget has come from monies set aside from the vending stand proceeds, pursuant to the Randolph-Sheppard Act and regulations, as well as from vending machine profits. The amount of federal funds allocated to the program for fiscal years 1974 through 1983 is set out in Exhibit 3.

7. As a condition of using this federal funding for the vending stand program and receiving the designation as licensing agency, the Commission and the Division of Services for the Blind have agreed to administer the program in accordance with the Randolph-Sheppard Act and regulations promulgated thereunder.

8. The Randolph-Sheppard Act requires the state licensing to agree

> that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such state agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, as funds under this paragraph shall be set aside for such purposes: *Provided, however*, that in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary.

20 U.S.C. §107b(3). Provision (E) of this section, relating to retirement or pension funds, was added to the Randolph-Sheppard Act by amendment in 1974.

9. Prior to October 1, 1978, the State rules and regulations governing the administration of the North Carolina vending stand program provided that the licensing agency

could set aside funds from the proceeds of the stands, pursuant to 20 U.S.C. §107b, only for the purposes of (1) maintenance and replacement of equipment; (2) the purchase of new equipment; (3) management services; and (4) assuring a fair minimum return to operators. Effective October 1, 1978, these rules and regulations were amended to provide that stand proceeds could also be set aside for

> (5) the establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is so determined by a majority vote of blind operators licensed by the division, after the division provides to each such operator information on all matters relevant to such proposed purposes.

No vote has ever been held to determine whether a majority of the vendors wished to have funds set aside from stand proceeds for the purposes of providing pension or retirement benefits.

10. From July, 1971 through early 1978, the agency set aside 10% of the gross sales of each stand for purposes (1) through (4) identified in the preceding paragraph. From 1978 through June, 1980, the agency set aside 15% of stand net proceeds (total revenues minus cost of goods sold and operating expenses) for these purposes; since that time, it has set aside 20% of the net proceeds for these purposes. *See* Exhibit 4. The Agency has refunded to the vendors, on a pro rata basis, the unused portion of funds set aside, as reflected in Exhibit 5.

11. Prior to July, 1971, operators were paid a weekly salary (and bonuses). Since July, 1971, the State licensing agency has regularly collected the gross receipts of the vending stands, made deductions therefrom for various purposes, and distributed the balance to the vendors. At least since October 1, 1978, the licensing agency has provided to the vendors a monthly Statement of Revenue and

Expense showing all these deductions. *See* Exhibit 6. A portion of the funds set aside by the licensing agency from the net proceeds of the stands has been used to subsidize those vendors whose income otherwise would not equal or exceed a guaranteed minimum return established by the program.

12. The State regulations governing the program have always provided that title to all equipment, merchandise and other assets of the vending stands is vested in the licensing agency.

13. On June 21, 1968, the North Carolina Attorney General's Office issued an opinion letter stating that the Bureau and Bureau funds were subject to control by the Commission. (Exhibit A to the Answer of Defendants Morrow, Gruber, and Van Name.) On December 27, 1968, the Attorney General's Office wrote to the State Auditor concerning the vending stand program. (Exhibit B to the Answer of Defendants Morrow, Gruber and Van Name.) True copies of these letters are attached hereto as Exhibits 7 and 8.

14. Pursuant to Section 15 of the 1969-1971 North Carolina Appropriations Bill, Three Hundred Thousand Dollars ($300,000.00) of unobligated Bureau Reserve Funds, which the Bureau had placed in a special reserve account with the State Treasurer, were transferred into the State's General Fund, Operating Code 16041 (Commission for the Blind). A true copy of this legislation is attached hereto as Exhibit 9.

15. In 1969, the North Carolina General Assembly requested the Commission to review and make recommendations as to the personnel status of the vending stand operators and the manner in which best to provide them adequate retirement benefits. 1969 General Assembly Session Laws, Chapter 1255. A true copy of this legislation is attached hereto as Exhibit 10.

16. Pursuant to this directive, the firm of H. Gray Hutchinson and Associates performed an actuarial study on behalf of the Commission. In addition, George B. Buck Consulting Actuaries, Inc., recommended to the Retirement System that, should the vendors be brought under the Retirement System, an additional sum, over and above the assets of the private retirement trust fund, would be required to fund the prior service liability the Retirement System would thereby incur. True copies of the aforementioned study and recommendation, along with other documents relating to the the private retirement plan and trust are attached hereto as Exhibit 11.

17. In 1971, the General Assembly passed House Bill No. 407 entitled "An Act Relating to the State Commission for the Blind, to Clarify the Employee's Status of Blind and Visually Handicapped Employees of the Commission, to Enroll Such Employees in the Teachers and State Employees' Retirement System, and to Make an Appropriation Therefor." 1971 General Assembly Session Laws, Chapter 1025. This Act:

(1) Amended N.C.G.S. §111-27.1 by adding a new sentence at the end thereof, which reads as follows: "Blind or visually handicapped employees or vending stand operators employed by the North Carolina State Commission for the Blind, Bureau of Employment for the Blind Division, are hereby declared to be State employees."

(2) Amended N.C.G.S. §126-5(b) to exempt the vending stand operators from Chapter 126 of the General Statutes known as the State Personnel Act.

(3) Amended Chapter 135 of the General Statutes by inserting a new §135-16.1, which reads as follows:

> *Blind or visually handicapped employees.*—On July 1, 1971, all blind or visually handicapped employees employed by the State Commission for the Blind, Bureau of Employment for the Blind

Division, shall be enrolled as members of the Teachers' and State Employees' Retirement System. All such employees shall be given full credit for all service theretofore as employees of the State Commission for the Blind, Bureau of Employment for the Blind Division. All retired employees drawing or receiving benefits from and under the private retirement plan purportedly created on December 6, 1966, by the Bureau of Employment for the Blind Division pursuant to a trust agreement purportedly entered into with a private banking institution as trustee shall continue to be paid by the Teachers' and State Employees' Retirement System benefits in the same amount which they purportedly were entitled to under the private retirement plan and trust agreement, except that such retired persons shall be eligible for such annual cost-of-living increases as may be provided for retirement members of the Teachers' and State Employees' Retirement System under the provisions of this Article.

Upon the enrollment of the employees in the Teachers' and State Employees' Retirement System, the purported private retirement plan and trust agreement hereinabove referred to shall be dissolved and terminated.

(4) Provided for the transfer of the assets of the private retirement plan and trust agreement, which amounted to $163,490.09, to the Board of Trustees of the Teachers and State Employees' Retirement System.

(5) Provided for a one-time appropriation to the Teachers and State Employees' Retirement System out of the general fund of the State in the amount of $145,000 to fund the projected liability incurred by the System as a result of the other provisions of the Act.

A true copy of this legislation is attached as Exhibit 12. Pursuant to this legislation, the vendors were enrolled in the Retirement System.

18. At all times relevant herein, the "employer" contribution to the Retirement System (and to Social Security) for each vendor has been paid with funds deducted from the proceeds of the stand operated by that vendor.

19. Since 1971, no State funds have been appropriated for the vending stand program or for compensation or fringe benefits of the vendors, including the "employer" contributions to the Retirement System and Social Security.

20. On March 31 and June 1, 1977, HEW and the Division exchanged correspondence. True copies of that correspondence are attached hereto as Exhibit 13.

21. At least by November 15, 1978, the Division had entered into a written licensing agreement with each operator of the form attached to these Stipulations as Exhibit 14. The Division entered into identical agreements with all operators licensed subsequent to November 15, 1978, until a revised form agreement was adopted in April of 1984. *See* Exhibit 14a.

22. In connection with the 1981 Session of the North Carolina General Assembly, the Division proposed an expansion budget request seeking State funding of the vendors' employer contribution to the Retirement System. A true copy of this Expansion Budget Request is attached hereto as Exhibit 15.

23. In early 1982, representatives of the Division met with Merv Darter of the Rehabilitation Services Administration ("RSA"). Among the topics discussed at that meeting was the vendors' participation in the Retirement System. Following that meeting, Dr. Steven J. Cornett, the Regional RSA Commissioner and Mr. Darter's supervisor, wrote a letter dated March 26, 1982, to the Division,

a true copy of which is attached hereto as Exhibit 16. (Exhibit 1 to the Complaint.)

24. Following the receipt of that letter, on May 10, 1982, L. Earl Jennings, Jr., then Director of the Division, wrote to Dr. Sarah T. Morrow, Secretary of the North Carolina Department of Human Resources, concerning, among other things, the vendors' participation in the Retirement System. A true copy of that letter, and the attachments included therewith, are attached hereto as Exhibit 17.

25. In 1983, the General Assembly enacted Senate Bill 247. 1983 General Assembly Session Laws, Chapter 867. A true copy of the Bill is attached hereto as Exhibit 18.

26. Pursuant to this Act, licensed vendors who had been participating in the Retirement System were required to elect by September 30, 1983, (1) to continue contributing both the "employer" and "employee" shares to the Retirement System; or (2) to cease contributing to the System *and* (a) receive a refund of employee contributions plus statutory interest; (b) apply for and commence receiving a monthly retirement allowance; or (c) leave accumulated contributions in the System and retain the right to receive an actuarily reduced pension at some future date. *See* Exhibit 19. Exhibit 20 indicates the number of vendors exercising these various options as of October, 1983.

27. All documents attached as Exhibits to the Deposition of Stephen A. Johnson, former Chief of the Business Enterprises Section of the Division of Services for the Blind (with the exception of Exhibits 1 and 60-64 thereto), were produced to plaintiffs from the regularly maintained files of the Division.

This 29th day of November, 1984.

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